IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

There is an air of abstraction about the Government's brief which seems intended to lull the reader into a disregard of the facts. Such abstract consideration of constitutional questions is not conducive to the intelligent development of our law. The facts are notorious. Petitioner and many other loyal former Government employees, including Under Secretary of the Treasury, Mr. Harry Dexter White, have been haled before investigating bodies over nearly a decade in an alleged inquiry into an espionage conspiracy claimed by Miss Elizabeth Bentley to have occurred during the last war (R. 9-10). Such widespread devastation of human lives is rare in our history; it is part of the widespread hysteria of our times.

The investigation involved herein was the latest phase of this harassment. Grand juries in four cities called former government employees before them to inquire whether they and their friends had been Communists or spies during the last war (R. 2-4, 21). These investigations were accompanied by extensive newspaper publicity (R. 20-21), cf. *Application of United Electrical Radio & Machine Workers of America*, 111 F. Supp. 858 (S. D. N. Y. 1953). Simultaneously the Assistant Attorney General in charge of the investigation made a public address charging the petitioner with espionage (R. 19). Previously the Attorney-General himself, together with the Director of the Federal Bureau of Investigation, had made similar public charges before a congressional investigating committee against petitioner and others (R. 15).

In the fall of 1954 petitioner was called before two grand juries, one in the District of Columbia, the other in the Southern District of New York (R. 10). Petitioner was asked whether he, Mr. White, and other former government officials, had been members of the Communist Party or of an espionage ring (R. 2, 3). He declined to answer these questions, asserting his constitutional privilege, and appeared before a federal district judge upon the Government's application for a grant of immunity in the second of these examinations.

He challenged the *bona fides* of the investigation, alleging that it was politically inspired and that it was not an inquiry into crime (R. 7-22). He requested, to no avail, that the district judge examine the grand jury minutes to confirm this charge (Tr. 73-76).* He appealed to the district judge to exercise that supervision over the Grand Jury which is required under *Hale* v. *Henkel*, 201 U. S. 43, 65-66 (1906), and *Hoffman* v. *United States*, 341 U. S. 479, 485 (1951).

* The charge is particularly true here where the questions related to events nine to thirteen years ago. Traditionally the immunity power has been used to meet some present evil.

In the course of the argument, it was pointed out to the district judge that a full denial of knowledge of the espionage, allegedly, under investigation by the grand jury, had been given to the F. B. I., a grand jury and a congressional committee by petitioner in 1947 and 1948 (R. 10-12). Accordingly, the most recent grand jury appeared to be primarily interested in securing a repetition of petitioner's *denials* of political affiliations which it might use as the basis of a prosecution for perjury.

Despite petitioner's uncontroverted affidavit setting forth the facts in support of the foregoing, the District Court abdicated its responsibility as a protector of citizens vis-a-vis grand juries under its jurisdiction, as the agency authorized by Congress to grant immunity, and as a court required to set aside any arbitrary action of the other branches of government.

II.

The Government's discussion of the constitutional privilege starts and ends with *Brown* v. *Walker*, 161 U. S. 591 (1896). It is completely silent as to the historic origins of the privilege. "Our forefathers when they wrote this provision into the fifth amendment of the Constitution, had in mind a lot of history which has been largely forgotten today" (*Maffie* v. *United States*, 209 F. 2d 225, 227 (C. A. 1st 1954)).

The Government treats the privilege in the limited sense of a protection against imprisonment. In so doing it forgets that the privilege was the fruit of the Puritan Revolution, and that "the real political significance of Puritanism" was "its insistence upon the sole criterion of the individual conscience" (Gibb, *John Lilburne, The Leveller* (1947), 69 *id.* at 111, 167).

The dissenters of the Seventeenth Century "do not care about their goods or esteem their lives when efforts are made to moderate their doctrines" (see Gibb, *supra*, p. 39)

Their battle with the Star Chamber and the High Commission did not involve objections to particular questions but a refusal to take the oath *ex officio*. It was John Wharton who proceeded "to condemn all such oaths roundly—'the oath of churchwardenship, the oath of canonical obedience, and the oath *ex officio*'" (Gibb, *supra*, p. 48).

The Act for the Abolition of the Court of High Commission, 16 Car. 1, c. 11, s. 4 (1641) which resulted from this attitude of the Puritans was not limited to the danger of physical incarceration. It directed the ecclesiastical officials not to

> "*ex officio*, or at the instance or promotion of any other person whatsoever, urge, enforce, tender, give or minister unto any churchwarden, sidesman or other person whatsoever, any corporal oath, whereby he or she shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime, offence, delinquency or misdemeanour, or any neglect, matter or thing, whereby or by reason whereof, he or she shall or may be liable or exposed to any censure, pain, penalty or punishment whatsoever."

It must be remembered that the oath itself was regarded as a form of unlawful pressure to be resisted by the witnesses. The privilege was a defense against both physical compulsion and the moral compulsion that an oath to a vengeful God commands of a pious soul.* Hence Governor Bradford's ministers' warning that a magistrate "may not

*Senator Bayard was therefore quite right historically when he said that "yet it is of far greater and higher importance not to permit a man to be subjected to the torture of being obliged to give evidence against himself * * *" 50 Cong. Globe, 37th Cong., 2d Sess. 430 (1862). In *Omychund* v. *Barker*, 1 Atk. 22, 48, 26 Eng. Rep. 15, 32 (1744), Hardwicke, J., said that the oath was an "appeal to the Supreme Being, as think him the rewarder of truth, and the avenger of falsehoods." See also *R.* v. *White*, 1 Leach Cr. L., 4th Ed. 430, 168 Eng. Rep. 317 (K. B. 1786).

extracte a confession by any violente means, whether it b
by an oath imposed or by any punishment inflicted."*

No extended historical analysis is needed to establi
that ."[t]he first ten amendments were proposed a
adopted largely because of fear that Government might u
duly interfere with prized individual liberties." Black,
dissenting in *Adamson* v. *California*, 332 U. S. 46, 7
These amendments "had their origin, as all know, in t
belief of many patriotic statesmen ." " " that, under t
Constitution,' as originally submitted to the People f
adoption or rejection, the national government might d
regard the fundamental principles of Anglo-American li
erty; " " "." Harlan, J. dissenting in *Twining* v. *New Je
sey*, 211 U. S. 78, 118.

The stirring story of the origin of our Bill of Rigl
has been frequently told; the most recent telling is in R
land, *The Birth of the Bill of Rights, 1776-1791* (195
George Mason, to whom, above all, we owe both the Virgi
Bill of Rights and our Federal Bill of Rights, "saw t
necessity for designating the people as the source of
political power" (Rutland, *supra*, 35). Madison was co
cerned with "a standard of free government which wou
create a national tradition to 'counteract the impulses
interest and passion'" (*ibid.*, p. 193). The only oppositi
to a bill of rights was led by those who believed that t
federal government was one of limited powers, and he
that the further limitations proposed by Mason w
unnecessary. This view is inherent in Section 2 of the V

* Bradford, *History of Plymouth Plantation*, Mass. Hist. S
Coll., ser. 4, Vol. 3, pp. 306-307 (1912). From this and other m
terial, Pittman correctly says, "it is apparent that the Puritan u
placed the ecclesiastical oath in the category of 'tortures' just a
did the rack, the boot, and the thumbscrew." Pittman: *The Colo
and Constitutional History of the Privilege Against Self-Incrimi
tion in America*, 21 Va. L. Rev. 763, 774 (1935).

ginia Declaration of Rights: "That all power is vested in and consequently derived from the people; that magistrates are their trustees and servants, and at all times amenable to them."

In order to insure the application of this principle there was included the Ninth Amendment providing: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See the first full study on this subject, Patterson, *The Forgotten Ninth Amendment* (1955).

The Fifth Amendment must be read in the light of the purposes of the Bill of Rights. It is its conception that the people are the ultimate source of power, that the federal government is one of limited powers and that the people must be protected against the danger that the government will not recognize its limitations. It is for that reason that an attempt to limit the full impact of the constitutional privilege must be rejected by this Court. We think the dissenting Justices in *Brown* v. *Walker* had a more appropriate conception of the need to give a liberal and protective construction to the Fifth Amendment than did the majority of the Court in that case. It is time to return to the original meaning of the Constitution. Otherwise, as has been so well said, there may result "a permanent reorientation of the individual citizen in his historic relationship to government and organized society." (O'Brian, *National Security and Individual Freedom* (1955), 1).

IV

This is the first time since the decision in *Brown* v. *Walker*, 161 U. S. 591 (1896), that this Court is asked to re-examine and limit the rule of that case. The statement in the Government's brief (p. 14) that "The doctrine of *Brown* v. *Walker* has also been reinforced over the years by the consistent opinions and holdings of this Court" is incorrect.

In no case after *Brown* v. *Walker*, did counsel argue that the Fifth Amendment prohibited compulsory testimony despite a broad federal immunity law; nor did this Court have occasion to discuss the question.

The cases cited by the Government may be classified as those: (a) where the witnesses testified and then claimed immunity;[1] (b) where the witness' refusal to testify was upheld;[2] (c) where the validity or applicability of a state immunity law was in issue;[3] (d) where the constitutional privilege was not properly asserted;[4] (e) where the witness prosecuted for refusing to comply with a subpoena objected to the use in contempt proceedings of the testimony constituting contempt;[5] (f) where the witness acquiescing in the rule of *Brown* v. *Walker* challenged its applicability because of a differently worded immunity law.[6]

This case is not only a proper, it is the first occasion for this Court to review the meaning of the constitutional privilege in connection with immunity laws in the First Amendment area.

All of the previous federal immunity laws which reached this Court were in the field of economic regulation. None

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[1] Immunity claims were upheld in *United States* v. *Monia*, 317 U. S. 424; *Smith* v. *United States*, 337 U. S. 137; *Adams* v. *Maryland*, 347 U. S. 179; and rejected in *Burrell* v. *Montana*, 194 U. S. 572; *Glickstein* v. *United States*, 222 U. S. 139; *Heike* v. *United States*, 217 U. S. 423, 227 U. S. 131; *Shapiro* v. *United States*, 335 U. S. 1; and *Feldman* v. *United States*, 322 U. S. 487.

[2] *McCarthy* v. *Arndstein*, 266 U. S. 34; *Hoffman* v. *United States*, 341 U. S. 479.

[3] *Jack* v. *Kansas*, 199 U. S. 372; *Regan* v. *New York*, 349 U. S. 58.

[4] *United States* v. *Murdock*, 284 U. S. 141.

[5] *United States* v. *Bryan*, 339 U. S. 323.

[6] *Hale* v. *Henkel*, 201 U. S. 43.

of these statutes placed the citizens of this country under the apprehension of being compelled, under penalty of conviction of contempt of court, to testify privately and publicly as to their political associations and convictions.

V

Throughout its brief, the Government shows complete unawareness of the nature of our times and of the attacks on civil liberties which threaten to change the very nature of our government. The immunity Law and the persecution of petitioner are incidents in that attack; it is because of the broader picture that petitioner's arguments are sound.

Perhaps it is because the Government cannot or will not see the engulfing forest of oppression, that it concentrates so intently on the trees. Such meticulous attention to legalisms is inappropriate enough in consideration of any constitutional law question; it is completely out of place here. We could not reply to each of the Government's misconceptions without a line-by-line refutation of its brief; a few illustrations will serve to make our point.

The Government speaks of protecting the witness "from disgrace and infamy" (Gov't Br. p. 18); we argue that he is entitled to protection against outlawry. (See Taylor, *Grand Inquest* (1955).) Similar misleading understatement is found in the Government's reference to "the great investigations of the past" (Br. 19). Such a statement shows a complete lack of comprehension of the effect on our democracy of the past eight years.

So too, the Government discusses the perjury issue in a vacuum, as though petitioner sought a general rule protecting witnesses against perjury. But here, petitioner claims, the objective of the grand jury investigation is to furnish the basis for a perjury indictment against him, in

this setting, and in *this* political climate." As proof of that, he refers to the facts presented to the District Court, most of which are matters of public knowledge, and which add up to a truly ominous picture in the world of 1955. If petitioner may not look to the courts and to his Constitution for protection against such oppression, where may he look? The assumption that the Government is acting in good faith (p. 69) is small comfort to the petitioner; his own personal experience gives him little reason for feeling that the assumption is justified, and the Government's brief (p. 22) does nothing to assuage his fears.

As for the Government's quotation of Lord Chancellor Hardwicke's words that "The public has a right to every man's evidence" (Br. 20; 12 Cobbett's Parliamentary History of England 693, Debate in the Lords on the Bill to Indemnify Evidence against Robert Earl of Oxford, May 25, 1792), those words, read in their full context, take on a meaning precisely opposite to that which the Government, misled by Wigmore's incomplete quotation, supposes them to have. For the Lord Chancellor, opposing the immunity bill at issue and refuting the arguments of the Duke of Argyle, who had spoken in favor of the bill, reasoned as follows:

> "It has, my lords I own, been asserted by the noble duke, that the public has a right to every man's evidence, a maxim which in its proper sense cannot be denied. For it is undoubtedly true, that the public has a right to all the assistance of every individual; but it is, my lords, upon such terms as have been established for the general advantage of all. . . ."

[1] Cf. Love, *Statutes of Limitations in Criminal Law: the Perjury Dilemma*, 16 Ohio S. L. J. 219 (1955).

[2] "Even if the immunity determination had been vested in the United States Attorney, the district Court nevertheless has both duty and power to review for abuse of discretion. Cf. *Accardi v. Shaughnessy*, 347 U. S. 260; *Hecht Co. v. Bowles*, 321 U. S. 321; *Lee Fung v. Brownell*, 215 F. 2d 683; *United States ex rel. Francolus v. Shaughnessy*, 210 F. 2d 572 (C. A. 2, 1954); *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999 (C. A. 2, 1950)."

> "In the present case, my lords, the public has not a right to have evidence, because the public has hitherto subsisted upon this condition, among others, that no man shall swear in his own cause. The public has not a right to require from any man that he should betray himself, because every man may plead he is exempted from that demand by the public faith."[1]

It has become routine in our times for the Government to justify its disregard of the civil rights of the people, by taking refuge in the argument that its action is justified by the requirements of national security; the disabilities of the political dissenter, so pervasive in our time (see Petitioner's Brief, pp. 15-29) are but "prophylactic measures." The argument is not new to history. It was the justification for the excesses of the Star Chamber and the French Revolution. Similar arguments are made to excuse every wrong by a government, from the Inquisition to the refusal of Mississippi to desegregate its schools. If such contention can destroy the Bill of Rights, it offers no protection at all in times when protection is needed.

VI

The Government disingenuously suggests that if these sanctions are grounds for asserting the privilege, the petitioner is protected because they are then penalties and forfeitures within the meaning of the Immunity Act (Br. 27-28). To this there are two answers:

(1). Congress in passing this statute did not contemplate immunity of the kind referred to. It passed this law in

[1] Earlier the Lord Chancellor had said:

> "The public is indeed intitled (sic) to the evidence of every man, but not to every method of coming at that evidence. It is not intitled (sic) to the evidence of a man who may gain or lose by his evidence."

12 Cobbett's Parliamentary History of England, 652 (Secker Manuscript 1742).

the face of a reminder by opponents of the bill that the witnesses would be subject to precisely these sanctions (H. Rep. No. 2606, 83d Cong., 2d Sess., p. 12).

(2). It is impossible realistically to give the witness a protection against the disabilities which are imposed by such statutes as the Intesnal Security Act, the Magnuson Act, and the passport security regulations.

Congress has explicitly authorized many of these sanctions and disabilities, and it would require more than an immunity law phrased in the traditional language to render nugatory the substantive "anti-subversive" legislation.

The Government's discussion of a prosecution for "future criminal acts", fails to take a definite position with respect to the meaning of the Immunity Act. It says that the Act "is *susceptible* of a construction consistent with the view" that "prosecution for crime committed after compulsion of testimony can in no way be aided by the disclosures". This reasoning follows the pattern of the Government's brief by declining to ascribe any intent to Congress except an intent to comply with this Court's determination of what would be constitutional.

Whatever may be the right of this Court to construe ambiguous legislation in the light of constitutional problems, it will not attribute to Congress a fictitious intention to make a statute constitutional. This is a delegation of legislative power to the judiciary which is becoming more and more frequent as Congress passes laws close to the contours of its constitutional power.

The Government suggests that this is not the time to construe the scope of the Immunity Act's protection (Br. 31). Petitioner has refused to answer questions put to him because he asserted that the scope of the immunity was constitutionally inadequate. It is absurd therefore to suggest that his conviction should be affirmed leaving the determination of the scope of immunity to some future time.

VII

The Government refers to "a series of cases culminating in *United States* v. *Murdock*" (Br., 31) purporting to show the indifference of the Federal Government in immunity cases to the danger of state prosecution for crime.

This problem first arose in *United States* v. *Saline Bank*, 1 Pet. 100, where Chief Justice Marshall rendered the following opinion:

> "This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.
>
> The court below decided in favor of the validity of the plea, and dismissed the bill.
>
> It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it."

The suggestion in *Hale* v. *Henkel*, repeated by the Government in its brief, (Br., 33) that the federal court in the *Saline* case was administering state law, is not the point of Chief Justice Marshall's opinion and is not even mentioned in the second significant case, *Ballmann* v. *Fagin*, 200 U. S. 186, which the Government erroneously dismisses as dictum (Br., 33).

Ballmann had refused to produce a cash book and answer questions before a federal grand jury and advised the Court in contempt proceedings that he had been charged with conducting a bucket shop in violation of Ohio Law. Mr. Justice Holmes noted the existence of danger under both federal and state law and stated the witness' belief that the books "if produced * * * would criminate him in one of the two ways which we have explained."

But *Hale v. Henkel*, 201 U. S. 43, 68 relied upon by the Government (Br. 33) is no more than dictum. The appellant there argued that the immunity law therein did protect against state prosecution in violation of the Tenth Amendment (Appellant's Br. 58 *et seq.*), and the Government argued that the law did guaranty the witness against state criminal prosecution (Appellee's Br. 72).

Except for the *Saline* and *Ballmann* cases, *supra*, this Court did not decide the issue squarely until the first *Murdock* case, 284 U. S. 141 (1931). (See *United States* v. *Murdock*, 290 U. S. 389, 396).

In the first *Murdock* case the issue went by default. For while Murdock had referred in the administrative proceedings to the danger of state prosecution, his formal pleading asserted only the danger of "prosecution in this Federal Court" (*United States* v. *Murdock*, 284 U. S. 141, Record, p. 15). His brief cites neither the *Saline* nor *Ballmann* cases and relies exclusively upon the danger of federal prosecution (Appellee's Br., pp. 5, 6, 22, and 23). This Court itself stated: "Nothing of state concern was involved" (284 U. S. at 149). It is little wonder that the Government's forceful presentation of this issue in its brief (Appellant's Br., p. 2) was successful.

The Government here again offers us an elastic construction of the statute by stating that "Congress certainly intended to cover state prosecutions, *if it could*" (Br. 34, italics supplied). This is a most peculiar way of construing legislation. It is one thing to say for example that a federal agency has jurisdiction over matters affecting interstate commerce, leaving to the courts the judicial determination of whether a particular business falls under that rubric (see *e.g.*, *National Labor Relations Board* v. *Jones & Laughlin Co.*, 301 U. S. 1); that is a judicial function. It is quite another for a statute to have alternative legal meanings, the appropriate one to be selected by this Court in its discretion.

Certainly the first witness under a statute, written, as it were, in the alternative, is denied due process of law, if he is promised an immunity of whose scope Congress itself is ignorant until this Court speaks. But our argument goes beyond the petitioner in this case. It is the duty of the legislature to confront a witness and the courts with a single statute, not a choice of statutes. If the result is unconstitutional, Congress has the power to enact a new law, to meet this Court's views on constitutionality.

Adams v. *Maryland*, 347 U. S. 179 (1954), settles the power of Congress to protect its witnesses against the use by the states of their federally compelled testimony. That is very different from the power of Congress to immunize the witness against state prosecutions. The concurring opinion of Mr. Justice Jackson in the *Adams* case makes the distinction clear. Therefore it is incorrect to suggest that "the roots of the Adams decision * * * likewise support the authority of Congress to prohibit all state prosecutions relating to the subject matter of the compelled testimony" (Br. 35).

Our main brief has sufficiently indicated our doubts as to the ability of Congress to enjoin state prosecutions. Where it is not Congress who is doing the enjoining but two Federal prosecutors, the doubts are reinforced. * * *

The suggestion in the Government's brief that the crimes covered by the 1954 Act "are within the *federal government's* special domain," makes strange reading in the light of its argument elsewhere:

> "It is the position of the United States that the federal government has a paramount but not exclusive interest in the prevention of sedition; that under our federal system the states have the power to punish acts of sedition committed within their respective jurisdictions; *and that Congress has done nothing to limit or suspend the exercise of that power.* * * *" (Brief for the United States As Amicus Curiae in *Commonwealth* v. *Nelson*, No. 10, this Term, italics supplied).

The Government, in seeking to meet petitioner's argument that the Congress intended to require Court approval of a grant of immunity in cases arising out of grand jury investigations (as it most certainly did in cases arising out of Congressional investigations), has ignored much of the background referred to by petitioner.[1]

The most important element in the legislative history, not even mentioned by the Government, is the treatment given to the Keating bill (H. R. 6899) by the House Judiciary Committee.

---

[1] The Government at page 41 of its brief points out that the petitioner omitted certain language from the report of the House Committee. We regret if this inadvertence has caused any inconvenience. The entire passage in question reads as follows:

> "Finally, before the immunity is actually granted to the witness, the approval of the United States district court wherein the inquiry is being conducted is to be obtained. The court in reaching its decision will have the aid of the views and facts of both the congressional committee and the Attorney General.
>
> The mere recital of these required procedures should clearly indicate that the possibility of an 'immunity bath' is definitely eliminated.
>
> In cases before a grand jury or a court, similar precaution exists. In such instances, if a United States attorney decides that in an authorized matter immunity should be granted to a witness who has claimed his privilege, that prosecutor, having adjudged such testimony to be necessary in the public interest, must first obtain the approval of the Attorney General for such grant and then apply to the court for the necessary instruction to the witness to testify or produce evidence. All conditions must be complied with before the grant of immunity can be given to the witness.
>
> In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."

That bill, after describing the procedures to be followed in granting immunity in cases pending before Congressional Committees, provided in subdivision (b):

> "Whenever in the judgment of the Attorney General the testimony of any witness * * * in any case or proceeding before a grand jury * * * is necessary in the public interest, such witness shall not be excused from testifying * * * on the ground that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify * * *."

Subdivision (c) of H. R. 6899 provided that the judgment of the Attorney General as to the necessity to testify should be confirmed in writing addressed to the grand jury concerned.

Had the bill been passed, the procedure followed here would have been proper. The Attorney General would have filed (as he did) his approval of the grant of immunity, and upon the continued refusal of the witness to testify, the court would have directed the witness to answer. No legislation, of course, was necessary to require such court direction; it was required long before the passage of the Immunity Act and the reasons for it are fully discussed by the Court in *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1, 1954). Continued refusal of the witness, after such direction, would have resulted in a conviction for contempt.

But H. R. 6899 was dropped in committee and a new bill substituted. Aside from some verbal changes,[1] the two most important changes were: (1) the kinds of cases in which immunity could be granted were limited to so-called "national security" cases; and (2) the combined judgment

[1] Such as adding the requirement that the United States Attorneys approve a grant of immunity.

of the United States Attorney and the Attorney General was limited by the *additional* requirement of Court action.

The Government would make the latter of these changes a meaningless gesture since the Court's direction to the witness (as distinguished from Court approval of the grant of immunity) would have been required even under H. R. 6899 (Pet. Br. 39). None of the federal immunity statutes preceding the Immunity Act of 1954 was intended to delegate immunity power to the courts. Hence, none contained a provision for a court order. This difference in language cannot be disregarded.

In interpreting legislation, the Court should attempt to give meaning to all of the language used by Congress. This is particularly true when, as in the instant case, the language in dispute was added by Congress and an alternative bill omitting that language was rejected. *Brooks* v. *United States*, 337 U. S. 49.

We have pointed out (Pet. Br. pp. 41-43) that there was never any question in the minds of Congress or even in the mind of the Attorney General as to the meaning of this bill prior to the commencement of this litigation.

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[1] Indeed the Solicitor General himself has, in other litigation, seemingly adopted our view of the law. Thus in the brief submitted to this Court only a few weeks ago in *Communist Party of the United States* v. *Subversive Activities Control Board*, Oct. Term 1955, No. 48, the Government's Brief states, at pp. 113-114, footnote 30:

> "It is true, as the Court observed, that under that [Immunity] statute the courts have broad power to grant immunity, upon the application of the Attorney General in proceedings before them involving violations of the statute here involved."

The Government was there referring to the decision of the Court of Appeals for the District of Columbia in *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C. A. D. C., 1955).

Perhaps consistency on the part of the Solicitor General is not required and we suppose that the views of the Court of Appeals in the *Subversive Activities Control Board* case which the Solicitor General adopted as his own views in the brief submitted to this

The statements of an executive officer as to his understanding of the meaning of legislation may not be binding on him, but such statements, where made immediately after the passage of a law with which he was critically concerned, cannot be ignored as an indication of what he thought Congress intended. Moreover, his views are but an echo of the views of the House manager of the legislation, made in the course of debate on the bill. "

Indeed it is difficult to see how the intent of Congress could have been expressed any more clearly than Representative Keating expressed it when he reported the bill to the House as providing "for the granting of immunity in both proceedings before congressional investigation committees and before courts or in grand jury proceedings, but it does not leave the final determination as to the granting of immunity in either the hands of the investigating committee or the Attorney General, but rather the court" (Pet. Br. 41-42).

Representative Keating was not expressing a casual, uninformed view; he was a member of the Judiciary Committee; he was the manager of the bill; he was the author of the bill which had been rejected. *Galvan* v. *Press*, 347 U. S. 522, 526-527.

The Government further argues that the Court could here apply the familiar doctrine that a constitutional construction of the statute should be preferred rather than one that raises serious doubts of constitutionality. "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Where the intention of Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced

Court could not bind this Court in any event. We do suggest, however, that it seems that for *all* purposes, except this litigation, the Department of Justice has taken the position that under the terms of the Act the court is the agency which grants immunity in grand jury and court proceedings.

must answered." *Lucas v. Ice Cream Co. of Boise*, 280 U. S. 373, 379. See also *Hopkins Federal Savings & Loan Association v. Cleary*, 296 U. S. 315, 335.

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